IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3269 of 2003

For Approval and Signature:

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SWIL LIMITED - Petitioner(s)
Versus
ENVIRONMENTAL PLANNING GROUP LTD. - Respondent(s)

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Appearance :
MISS AMRITA THAKORE FOR MR MIHIR H JOSHI for Petitioner
MISS NITA PANCHAL FOR MR AR GUPTA for Respondent

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CORAM : HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 20/07/2006

ORAL JUDGMENT

1. By this petition under Article 227 of the Constitution of India, the petitioner challenges the judgment and order dated 28th February, 2003

passed by the learned Judge of the City Civil Court, rejecting the Civil Miscellaneous Application No.771 of 2001 filed by the petitioner for setting aside the exparte judgement and decree dated 28th January, 2000 passed against it in Summary Suit No.4206 of 1999 filed by the respondent for recovery of an amount of Rs.3,33,368/- along with interest at the rate of 18% per annum from 1st August, 1999.

2. The respondent herein instituted Summary Suit No.4206 of 1999 against the petitioner Company on 23rd August, 1999 for recovery of an amount of Rs.3,33,368/- with costs and interest at the rate of 18% per annum from 1st August, 1999 till payment thereof. It is the case of the petitioner that no process fee was paid by the respondent for service of summons, but an application was made by respondent to serve the summons of the above suit on the petitioner by substituted service – RPAD which was allowed by the Court. It is further the case of the petitioner that, on 3rd January, 2000, summons was sent to the factory of the petitioner at Jhagadia which was at the relevant time not the registered office of the petitioner, which according to the petitioner was the only place where such service could have been effected. That, the said summons was purportedly accepted by one Shri K.B.S.Rawat, an employee of the petitioner. It is the case of the petitioner

that the said employee did not inform the petitioner about the receipt of the summons and neither did he ensure appearance in the proceedings, which resulted into an exparte decree being passed by the Ahmedabad City Civil Court, on 28th January, 2000, for an amount of Rs.2,95,670/- with interest at the rate of 12% per annum from 1st May, 1999 till payment thereof.

3. It is the case of the petitioner that there was substantial dispute between the parties on account of failure of the respondent to fulfill its contractual obligations. That, even if the claim of the respondent was accepted, there was an overpayment by the petitioner, as a result of which it had also demanded a refund of Rs.2,30,075/- from the respondent vide letter dated 2nd April, 1999, which had not been produced by the respondent

4. On 5th February, 2001, the respondent filed a Precept Application No.91 of 2001 in the aforesaid Summary Suit under Section 46 of the Code of Civil Procedure, 1908 (the Code) for a direction to the Civil Judge (S.D.), Bharuch to attach movable goods of the petitioner. However, by an order dated 1st March, 2001, the said application for issuance of precept came to be rejected without issuing notice, by the Ahmedabad City Civil Court on the ground that

the respondent did not show good-faith by taking prompt action on the decree.

5. On 29th March, 2001, the respondent filed Special Execution Petition No.15 of 2001 under order 21 Rule 11 of the Code against the petitioner, seeking execution of the exparte decree, claiming an amount of Rs.3,66,328=58.

6. It is the case of the petitioner that notice of the said Execution Petition was again served upon Shri K.B.S.Rawat, who appeared in the proceedings and purportedly admitted the liability to make payment to the respondent. On 19th September, 2001, the Executing Court issued a Jungam Warrant on the petitioner, which was served on the same day. It is the case of the petitioner that it was then, for the first time, that the petitioner came to know that a Summary Suit had been filed against it by the respondent, and that, a decree had been passed thereon and execution proceedings had also been initiated by the respondent That, the petitioner deposited the entire decreetal amount with the Executing Court and requested for time to take necessary action for setting aside the exparte decree. That, thereafter the petitioner issued a show cause notice to Shri Rawat for his aforesaid conduct and subsequently, the said Shri Rawat has resigned from the Company.

7. On 3rd October, 2001, the petitioner, after making necessary inquiry in the trial Court and obtaining copies of the pleadings and documents, filed Civil Misc. Application No.771 of 2001 for setting aside the exparte decree dated 28th January, 2000 in Summary Suit no.4206 of 1999. By an order of the same date, in the Notice of Motion moved by the petitioner in the said application, the trial Court restrained the respondent from withdrawing the decreetal amount deposited in the Executing Court.

8. By the impugned order dated 28th February, 2003, the aforesaid application made by the petitioner was rejected, which has given rise to the present petition.

9. Heard Ms.Amrita Thakore, learned advocate for Mr.Mihir Joshi on behalf of the petitioner and Ms.Nita Pandit, learned advocate for Mr.A.R.Gupta on behalf of the respondent.

10. The learned advocate for the petitioner drew the attention of the Court to the facts narrated hereinabove and submitted that the trial Court had erred in not setting aside the exparte decree, despite the petitioner having a meritorious case. It was submitted that the learned Judge has erred in holding that since its employee was negligent in ensuring appearance pursuant to the summons of the

Summary Suit initiated by the respondent, received by him, the petitioner was vicariously liable for the same, and that, the exparte decree should not, therefore, be set aside as it would amount to the petitioner taking benefit of its own wrong and snatch away a right which had accrued in favour of the respondent on account of exparte decree.

11. It was submitted that the learned Judge has erred in concluding that the petitioner has concocted the case of its ex-employee being negligent on the sole ground that no action appeared to have been taken against that employee after the show cause notice, overlooking the fact that the said employee had resigned sometime thereafter. It was submitted that the petitioner had not been duly served with the summons of the subject Suit since the same had been sent by Registered Post to its factory at Jhagadia, which was not a registered office of the petitioner at the relevant time. It was submitted that the petitioner had a substantial defence and counter claim against the Suit filed by the respondent, and therefore, for doing substantial justice, it was necessary to set aside the decree and afford an opportunity to the petitioner to present its case, particularly when the decreetal amount had already been deposited by the petitioner in the Executing Court, at Bharuch and no prejudice

would be caused to the respondent

12. The learned advocate for the petitioner submitted that, despite the fact that the registered office of the company was located at Calcutta, the petitioner company was impleaded through its Copper Division, at Bharuch as a defendant in the said Suit. It was submitted that, moreover, there was a specific clause in the contract between the parties providing that in case of any dispute, the jurisdiction shall lie with the City Courts, at Calcutta, West Bengal being the place of registered office of the petitioner company. It was submitted that the respondent had failed to draw the notice of the Court to the aforesaid facts and hence, the judgement and decree being bad also on the ground of lack of territorial jurisdiction, ought to have been set aside by the trial Court.

13. The learned advocate for the petitioner submitted that the petitioner should not be penalised on account of the negligence of its employee. It was submitted that, on the facts of the case, the petitioner had made out a case for setting aside the decree under “special circumstances” as contemplated under Order 37 Rule 4 of the Code. It was submitted that, in the circumstances, coupled with the fact that the petitioner had a good case on merits, and that, “special circumstances” as contemplated

under Order 37 Rule 4 of the Code had been made out, the learned Judge had erred in rejecting the application of the petitioner.

14.In support of her contentions, the learned Advocate for the petitioner relied upon the following decisions:

(i)The decision of the Apex Court in the case of *M/s Ram Chand and Sons Sugar Mills Private Ltd., Barabanki (U.P.) v. Kanhayalal Bhargava and others*, AIR 1966 SC 1899 was cited to submit that in the facts of the said case where default had been committed by a director of the appellant company who failed to appear in Court when he was so required under O.XXIX, R.3, the Apex Court had held that unless there is a finding of collusion between the appellant and the director in that, the former prevented the latter from appearing in the Court, it would be difficult to make the company constructively liable for the default of one of its directors; whereas in the present case, the petitioner was on even stronger footing, in that, here was a case of default on the part of an employee of the company in ensuring appearance in Court, hence, in the absence of any finding of collusion between the petitioner and the employee whereby the employee was prevented from ensuring attendance in Court, the company could not be held to be constructively liable for

default on the part of the said employee.

(ii)Reliance was placed upon the decision of the Apex Court in the case of *G.P.Srivastava v. R.K. Raizada and others, [2000] 3 SCC 54* wherein it has been held that the words “was prevented by any sufficient cause from appearing” must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party; to submit that the same principle is required to be adopted while construing the expression “special circumstances” under Order XXXVII Rule 4 of Code.

(iii) The decision of the Apex Court in the case of *V.K.Industries v. M.P. Electricity Board, Rampur*, (2002) 3 SCC 159 was cited to point out that in the said case the direction to deposit part of the decretal amount as well as to furnish a bank guarantee for the remaining sum was held to be onerous, harsh and unreasonable, whereas in the case at hand the entire decretal amount has been deposited. It was urged that in the circumstances, when the entire decretal amount has been deposited with the executing Court, no prejudice would be caused to the respondent if the ex-parte decree is set aside and the case is heard on merits.

(iv) Reliance was also placed upon the decision of this Court in the case of *Madhur Garments v. Hasmukh Shopping Centre and Others*, 1999 (2) GLR 1580, wherein the Court in the facts of the said case wherein the decretal amounts had been recovered by the plaintiff – petitioner, coupled with the fact that on the last date of hearing the Counsel for the defendants – respondents could not remain present in the Court due to personal difficulty has been taken to be a special circumstance. It was submitted that in the present case when the petitioner has deposited the entire decretal amount coupled with the fact that the petitioner was prevented by sufficient cause from remaining present in response to the summons issued by the Court, the same can certainly be said to be a "special circumstance" within the meaning of Order 37 Rule 4 of the Code.

15. In conclusion, it was submitted that the petitioner has a good case on merits, and that, it was prevented from defending the suit for no fault on its part, hence, special circumstances as envisaged under Order 37 Rule 4 of the Code had been made out. In the circumstances, the impugned order as well as the exparte decree dated 28th January, 2000 is required to be quashed and set aside, and the petition deserves to be allowed.

16.Ms.Nita Pandit, the learned advocate for the respondent submitted that the case of the petitioner that it was not aware of the institution of the suit till the Jungam Warrant was served upon the petitioner, is not true, as is evident from the record of the case. Attention was drawn to the show cause notice dated 22nd September, 2001 addressed by the petitioner company to Shri K.B.S.Rawat, Senior Manager – Administration, wherein it was stated that he was assigned the responsibilities to handle the Case No.4206 of 1999 on behalf of the management, and that, he had failed to inform the progress of the case on various dates of hearing and also not attended the case before the Court on due dates and as a result, the case had proceeded exparte and the Court had awarded decree amounting to Rs.3,66,329=58 against the management. That, he had not bothered to inform the management knowing that the party was coming to the site on 19th September, 2001 with execution warrant. It was submitted that, on perusal of the aforesaid show cause notice, it is evident that the management was aware of the institution of the suit, and that, in fact, the said case had been assigned by the management to Mr.K.B.S.Rawat, and that, therefore, the submissions to the effect that the petitioner was not aware of the said proceeding or that Shri Rawat was not authorized to handle the case, are not true.

17. Attention was drawn to the explanation dated 24th September, 2001 tendered by Shri K.B.S.Rawat pursuant to the show cause notices dated 22nd September, 2001, wherein he had stated that summons in the Summary Suit No.4206 of 1999 was received by him and that the second copy had come by post which was handed over to him along with the relevant files of the respondent by Dr.U.B.Saxena. It was submitted that, in the circumstances, the case of the petitioner that summons had been accepted only by Shri K.B.S.Rawat is belied, as the second copy of which had come by post had been received by the management, and that, the case had been specifically handed over to Shri K.B.S.Rawat. That, accordingly, it is apparent that the Company was well aware of the Suit, but did not take any action to see as to what steps had been taken to defend the Suit.

18. It was submitted that the summons had been served twice. That, Shri K.B.S.Rawat was a Senior Officer of the petitioner company who had been assigned the duty of handling the aforesaid case. That, negligence by Shri K.B.S.Rawat in defending the Suit amounted to negligence by the company, and that, in the circumstances, special circumstances sought to be created before the Trial Court are not substantiated.

19. It was further submitted that the petitioner has preferred an appeal against the exparte decree and was at the same time prosecuting the present proceedings challenging the order rejecting the petitioner's application under Order 37 Rule 4 of the Code for setting aside the exparte decree. It was submitted that it was not permissible for the petitioner to pursue two remedies at a time and hence, even on this count, the petition requires to be rejected.

20. It was submitted that the petitioner company is vicariously liable for the acts of its employee, viz. Shri K.B.S. Rawat as it is the settled position in law that the company is liable for any tort committed by its agent. It was submitted that the observations made by the trial Court in the impugned judgement are supported by evidence on record, and that the trial Court has not travelled beyond the evidence and material on record, no perversity is pointed out in the impugned judgement, hence, this Court may not exercise extraordinary jurisdiction under Article 227 of the Constitution.

21. Learned advocate for the respondent pointed out that the decision in the case of *Madhur Garments v. Hasmukh Shopping Centre*, 1999(2) GLR 1580 relied upon by the petitioner does not support the case of the petitioner, as in the said case,

the exparte decree had been passed as the counsel for the defendant had remained absent due to his personal difficulty. In the circumstances, the Court had come to the conclusion that special circumstances had been made out. That, in the present case, it was not on account of the negligence of the counsel, but on account of negligence of an agent of the company, which amounted to negligence on part of the company itself, hence, the said decision would not be applicable to the facts of the present case.

22. In rejoinder, the learned Advocate for the petitioner submitted that the Apex Court has, in the case of *Bhanu Kumar Jain v. Archana Kumar*, [2005]1 SCC 787 held that it is permissible to file an application under Order 9 Rule 13 of the Code and an appeal against the exparte decree under Section 96[2] of the Code simultaneously. In the circumstances, it was submitted that the contention raised on behalf of the respondent as regards the maintainability of the present application is required to be rejected.

23. The learned advocate drew the attention to the exparte order dated 28th January, 2000, which reads as under :

> “Deft. is duly served by R.P.A.D. However, none is appeared. On perusal of documents, evidence

> (original) as well as from the pleading and on being satisfied, suit is decreed for the sum of Rs.2,95,670=00 with 12% interest from 1/5/1999 till recovery. Costs to follow the cause."

It was submitted that, upon perusal of the aforesaid order, it is evident that the petitioner had been served only by RPAD and that the summons had not been served twice, as is sought to be contended on behalf of the respondent.

24. From the facts emerging on the record of the case, it appears that the petitioner was served by Registered Post A.D., which was received by its employee, one Shri K.B.S.Rawat. The said Shri Rawat neither entered appearance on behalf of the Company, nor did he inform the company as regards the service of the summons in the said Suit. The contention of the respondent, by placing reliance upon the explanation tendered by Shri K.B.S.Rawat, that the petitioner had been served with the summons twice, is not borne out from the record of the Suit, as is evident from the exparte order dated 18th January, 2000. Strong reliance has been placed by the respondent upon a show cause notice issued by the petitioner to Shri K.B.S.Rawat wherein it is stated that he had been assigned the responsibility to handle the case, but had failed to inform the management about the

progress and had not attended the case, resulting in the case having proceeded exparte. The learned Judge has also relied upon the aforesaid show cause notice to come to the conclusion that that the petitioner was aware of the institution of the suit. However, the case of the petitioner throughout is that the petitioner was not aware of the very institution of the suit, and that, for the first time, the petitioner came to know of the institution of the suit and the passing of the exparte decree upon the Jungam Warrant being served upon the company by the bailiff of the Bharuch Court, wherein the execution proceedings have been filed by the respondent Moreover, it is the case of the petitioner that it has a good case on merits. In the circumstances, there would be no cause or reason for the petitioner not to defend the suit, had it been aware of the institution of the same. In the circumstances, there is no reason to throw away the explanation tendered by the petitioner, stating that it was not aware of the institution of the suit, and that, it had come to know about the same only upon Jungam Warrant being served upon the petitioner company. Though the decision of the Apex Court in the case of *Ram Chand and Sugar Super Mills Pvt. Ltd.* (supra) was rendered in a different set of facts, on analogous principles it can be stated that in absence of any finding that the petitioner had not entered appearance

in response to the summons issued by the Trial Court on account of collusion between the petitioner and Shri K.B.S. Rawat, the petitioner company cannot be held to be constructively liable for the default on the part of Shri Rawat.

25. As can be seen from the impugned order dated 28th February, 2002, the learned Judge has given his findings in paragraphs 18 to 20 of the said judgement. In paragraph 18, after considering the rival submissions and perusing the pleadings and documentary evidence, the learned Judge has recorded thus, *"It is clear and admitted fact that the applicant-company had assigned the responsibility to handle the Civil Suit on behalf of the management and Mr.K.B.S. Rawat is holding a Superior Administrative Post as Senior Manager (Administration) and there was a clear-cut negligence on the part of Mr. K.B.S.Rawat."* The learned Judge has found the explanation given on behalf of the petitioner as regards issuance of show cause notice and tendering of explanation by Shri Rawat, admitting that there was no negligence on his part to be a fairy tale. The explanation has been jettisoned on the ground that the learned Advocate for the petitioner had not stated as to what action was taken against Shri Rawat after his admission of negligence. When the very case of the petitioner is that it was never aware of the

institution of the suit till being served with the Jungam Warrant in the execution proceedings, one fails to comprehend as to how the learned Judge has come to the conclusion that it was an admitted fact that the applicant company had assigned the responsibility to handle the Summary Suit on behalf of the management to Shri K.B.S.Rawat.

26. In paragraph 19 of the judgement, the learned Judge has considered the question as to whether the application is required to be allowed when the Senior Manager (Administration) of the petitioner company himself was negligent and willfully did not attend the Court? The learned Judge has referred to the decision of this Court in the case of Madhur Garments (supra) relied upon on behalf of the petitioner and found that, in the said case, the defendant was prosecuting the case with diligence whereas the learned counsel for the defendant had remained absent, that too, on account of personal difficulty, and the defendant was not aware of the absence of counsel, whereas in the present case, the applicant itself had remained careless in prosecuting the case. The learned Judge has thereafter referred to certain observations made by the Apex Court reported 1993 SCW 1178 and found that relying upon the said observations, the Karnataka High Court had, in the case reported in AIR 2001 Karnataka 104, refused to

set aside a decree in the exercise of powers under Order 9 Rule 9 where sufficient cause itself is enough. The learned Judge has then observed that, in the present case, where the decree is passed under Order 37, “special circumstance” is required to be made out. The learned Judge has further observed that it is needless to say that when “sufficient cause” is not made out, it cannot be said that a “special circumstance” is made out by the applicant. The learned Judge has thereupon come to the conclusion that the applicant has failed to make out “special circumstance” to set aside the decree.

27. It may be pertinent to note that while recording the aforesaid findings, the learned Judge has nowhere cited reasons for arriving at the conclusion that even sufficient cause is not made out. The learned Judge has thereafter referred to a decision of this Court in the case of *Omkar Textile Mills Pvt. Ltd. v. Hardik Chemicals, 1995(1) GLR 788* wherein it is held that the words “special circumstances” used in Order 37, Rule 4 cannot be equated with the words “sufficient cause”.

28. In paragraph 20 of the judgement, the learned Judge has referred to the following extract from the Book - “Law of Torts” by Ratanlal Dhirajlal: “*a Corporation is undoubtedly liable for torts*

committed by its agents or servants to the same extent as a principal is liable for the torts of his agent or an employer for the torts of his servant, when the tort is committed in the course of doing an act which is within the scope of the powers of the Corporation. It may be liable for assault, false imprisonment, trespass, conversion, libel or negligence." Applying the said principle, the learned Judge has come to the conclusion that it cannot be said that the petitioner company is not liable for the negligence of its employee Mr.K.B.S. Rawat and, therefore, cannot take advantage of its own wrong and, therefore, the right which is incurred (sic) in favour of the respondent qua the defendant cannot be snatched away. The learned Judge was of the opinion that allowing the application would mean giving benefit to the applicant for his own wrong which is not permitted in law. In the aforesaid premises, the learned Judge has rejected the application for setting aside the exparte decree.

29. A `tort' is a species of civil injury or wrong. Tort has been defined as a civil wrong for which remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation. Although a tort is a civil injury, not all civil injuries are torts, for no injury can be classified as a tort

unless the appropriate remedy for it is an action for damages. The following classes of wrongs stand outside the sphere of tort:

(1)Wrongs exclusively criminal;

(2)Civil wrongs which create no right of action for unliquidated damages, but give rise to some other form of civil remedy exclusively;

(3)Civil wrongs which are exclusively breaches of contract;

(4)Civil wrongs which are exclusively breaches of trust or of some other merely equitable obligation.

30.Admittedly, in the present case, the dispute arises out of alleged breach of contract. The very fact that a Summary Suit under Order 37 has been instituted goes to show that the claim in the suit is for a liquidated amount. Hence, the class of wrong involved in the present suit stands outside the sphere of tort.

31.Negligence, under the law of torts, has been defined as under :

> “In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of

duty, breach and damage thereby suffered by the person to whom the duty was owing."

32.Thus, negligence has to be suffered by the person to whom the duty was owed. In the present case, Shri Rawat was negligent as regards the discharge of his duties towards the petitioner. Thus, the tort, if any, can be said to have been committed against the petitioner. The negligence of Shri Rawat in the matter of handling the present case, can in no manner be said to be a tort against the respondent – plaintiff. In the circumstances, when the learned Judge has based his conclusion as regards the responsibility of the petitioner for the negligence of its manager by application of the principles of tort, it cannot be said to what extent the decision has been affected by such consideration. It is well settled that when conclusions are based on partly relevant and partly irrelevant considerations and it is not possible to discern to what extent the decision has been affected by such irrelevant considerations, the findings of the trial Court stand vitiated. Thus, the conclusions arrived at by the learned Judge stand vitiated as he has taken into consideration, with great emphasis, a wholly irrelevant principle of law and as such the decision based upon such irrelevant considerations cannot be sustained.

33.When the petitioner has pleaded "special

circumstances" as well as merits of the Suit, it was incumbent upon the learned Judge to record findings as to why "special circumstances" were not made out. No such findings have been recorded, nor have any reasons been assigned by the learned Judge for coming to the conclusion that "special circumstances" are not made out. Moreover, while rejecting the explanation tendered by the petitioner, the learned Judge has found that it was an admitted fact that the petitioner had assigned the matter to Shri Rawat, which is contrary to the basic case of the petitioner. In the circumstances, it cannot be said that the learned Judge has exercised discretion reasonably.

34. The Apex Court in the case of *Rajni Kumar v. Suresh Kumar Malhotra*, AIR 2003 SC 1322, has held that a defendant seeking the setting aside of an exparte decree is required to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In the present case, the petitioner has shown "sufficient cause" for its absence during the course of the suit proceedings as well as on the date of passing exparte decree. The petitioner has also disclosed fact which would entitle it leave to defend. Moreover, the petitioner has also paid the entire decretal amount of

Rs.3,66,229=50 with the Executing Court. Hence, no prejudice would be caused to the respondent plaintiff if the case is heard on merits. In the circumstances, the learned Judge has erred in rejecting the petitioner's application for setting aside the exparte decree.

35. For the foregoing reasons, the petition succeeds. The impugned judgement dated 28th February, 2003 is hereby quashed and set aside. Civil Miscellaneous Application No.771 of 2001 in Summary Civil Suit No.4206 of 1999 is hereby allowed. The judgement and decree passed by the Ahmedabad City Civil Court in Summary Civil Suit No.4206 of 1999 on 28th January, 2000 is quashed and set aside and Summary Civil Suit No.4206 of 1999 is restored to file.

36. Since Summary Civil Suit No.4206 of 1999 is restored to file, it is deemed fit in the interest of justice to direct that, pursuant to the summons for judgement issued earlier, the petitioner – defendant shall file its application for leave to defend within a period of four weeks from the date of receipt of a certified of this order, and the suit proceeding shall proceed further from that stage.

37. Rule is made absolute accordingly with no order as to costs.

[HARSHA DEVANI, J.]

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